Supreme Court of the United States.

OCTOBER TERM, 1901.

UNITED STATES, Appellant, vs. A. A. GREEN, R. R. RICHARDSON, COLIN CAMERON, et al., Appellees.	No. 109.
HARVEY L. CHRISTIE and COLIN CAMERON, Appellants, vs. UNITED STATES, Appellee.	No. 129.

Appeal from the Court of Private Land Claims.

PETITION FOR REHEARING.

BY

HARVEY L. CHRISTIE AND COLIN CAMERON.

The Court erred in affirming the decree of the Court of Private Land Claims; because,

POINTS.

FIRST. The Spanish original of the Gadsden Treaty does not contain any condition that a grant need not be respected or considered as obligatory, unless it was located prior to the treaty. The only requirement contained in the Spanish version of the treaty is that the grant shall have been "inscribed and recorded" prior to the treaty. And by inscribed is meant that it shall have been noted or indexed, or, in other words, that a Toma de Razon of the grant shall have been made.

SECOND. The Spanish version of the treaty must control under the decision of this Court in the case of *Arredondo* vs. *United States* (6 Pet. 740) and under the weight of authority upon international law.

THIRD. The Sonora law of May 14, 1852, was in full force and effect at the date of the treaty, it is conceded by counsel for the Government, and that law must be read into the conveyance or title papers of this

grant with the same effect as if it had been originally inserted therein.

Under that law the grantee is entitled to select the "cabida legal" wherever he chooses within the out-boundaries of the grant.

FOURTH. When the law of 1852 is read into the conveyance the grant becomes at least as firm and valid as was a "floating grant" in California; and under the decisions of this Court a floating grant is a vested right of property which must be respected, unless the treaty expressly and clearly intended to exclude it from confirmation.

FIFTH. The moment the territory within the area of the Gadsden Treaty became a part of the United States, all the grants lying therein and all rights of property therein came under the protection of the Constitution of the United States, and no person (whether Mexican or citizen) can be deprived of his property as it existed at that instant, without due process of law.

In Mexico the "cabida legal" was never considered "nailed to the ground" at the center or any particular place within the out-boundaries of the grant.

SIXTH. The property must be respected, "as it then was" as said by this Court in Ely's case (171 U.S. 259).

> "A right of any validity before the treaty was equally valid afterwards. The act recognizes alike legal and equitable rights, and should be adminis-

tered in a *large and liberal* spirit."

U. S. vs. *Moreno*, 1 Wall. 400.

Surplus lands (Demasias) are defined by Mexican law

> "To be those held by private persons on primordial title and to a greater extent than specified, such surplus however being within the boundaries mentioned in the title, and consequently *mixed up in its entirety with the area for which a title is held.*"

This is the exact equivalent of saying that the "cabida legal" is mixed up in its entirety with the surplus lands within the grant; and hence it is obvious that "To every and each part of the land surveyed (i. e., within the out-boundaries of the grant) its owner has an equal right", as was said by Chief Justice Marshall in *Taylor* vs. *Brown*, 5 Cranch. 234.

The right to "select the principal or main area" ("cabida legal") at any place within the boundaries of the grant under said law of 1852, is the exact equivalent of the right to "allot the surplus" in any part of the grant which the grantee may choose, under said ancient law of Virginia, referred to by Chief Justice Marshall in the case just cited.

Hence the grant should be treated as "located", within the meaning of the Gadsden Treaty, in spite of the fact that a mistake was made in the original survey (provided the English version of the treaty is allowed to control); and the grantee should, nevertheless, be allowed to select his "cabida legal" in any part of the

grant he chooses; and if the Mexican version of the treaty is held to control, there would seem to be no doubt about the right of the grantee to select the "cabida legal" in any part of the grant he chooses.

SEVENTH. The action of Mexico, long subsequent to the treaty, in withdrawing from grantees the right to select the "cabida legal", does not alter or affect the character of that right as a vested and absolute right of property in the grantee, in the case at bar, at the date of the treaty.

Mexico can and has impaired the obligation of contracts and deprived its citizens of vested rights of property with impunity; but,

> "Every nation acquiring property by treaty, or otherwise, must hold it subject to the constitution and laws of its own government, not according to those of the government ceding it."
>
> *Pollard's Lessees* vs. *Hogan*, 3 How. 219.

And in this country, when a law is in its nature a contract, and absolute rights are vested under it the law cannot be repealed.

Terrett et al. vs. *Taylor*, 9 Cranch. 44.

> "And this is true on the principle of natural justice, even in the absence of the constitutional provision against the power of the state to take the property of an individual without due process of law, or against its power to impair the obligation of a contract."
>
> *Fletcher* vs. *Peck*, 6 Cranch. 177.

To confirm the grant in the case at bar in accordance with the decree of the Court of Private Land Claims is

to nail the four sitios, mentioned in the title papers, to the ground *at the center of the grant*, and to thus give to the grantee property which is practically worthless. In effect this decision is a confiscation of property and a forfeiture of the grant.

> "It is a cardinal rule that equity abhors a forfeiture."

As was said by this Court in the case of *Gonzales* vs. *Ross*, 120 U. S. 616:

> "All favorable presumptions will be made against the forfeiture of a grant."

And it is upon this theory that, so far as rights of individuals are concerned, in construing treaties, statutes, contracts and written instruments generally, the courts adopt a *liberal* construction, and if the treaty or statute admits of two constructions, one *restrictive* of the rights that may be claimed under it, and the other *liberal* as respects such rights, the latter is to be preferred.

1 Kent Com., 174;
Sharkes vs. *Dupont*, 3 Pet 242;
Hauenstein vs. *Lynham*, 100 U. S. 483.

Upon this same theory, in construing the rights of an individual, where there is a difference between the Mexican original of the treaty and the English version thereof, *the Court ought to adopt the construction contained in that version of the treaty which is most favorable to the rights of the individual.*

A translation of said law of Sonora of May 14, 1852, was made by Dr. J. I. Rodrigues, General Translator for the Bureau of American Republics at Washington,

D. C., and that translation is on file in this case under the title "ADDITIONAL BRIEF FOR CLAIMANTS", and we respectfully request this honorable Court to refer thereto.

ARGUMENT.

First.

THE ORIGINAL SPANISH VERSION OF THE GADSDEN TREATY, WHICH WAS RETAINED IN THE POSSESSION OF THE MEXICAN GOVERNMENT, DOES NOT CONTAIN ANY REQUIREMENT OR CONDITION TO THE EFFECT THAT A GRANT MUST BE "LOCATED" IN ORDER TO BE RESPECTED OR CONSIDERED AS OBLIGATORY.

The question was orally argued before this Court in the case of *Faxon* vs. *United States*, reported in 171 U. S. p. 244, and likewise in the brief which was filed therein by Francis J. Heney, Esq., on the part of the appellant. The question, however, has never been expressly decided by this Court prior to the decision in the case at bar, although it must be conceded that the case of *Ely's Administrators* vs. *United States*, 171 U. S. 220, leans that way in its reasoning.

The law on this subject is so clear, however, and the fact that the Spanish version of the treaty does not contain the word "located" is so free from doubt, that we are irresistibly led to the conclusion that this Court overlooked that fact in writing its opinion in the Ely case and likewise in this case.

Shortly after the publication of the decision of this Court in the Ainsa case, counsel for certain grant claimants sought the opinion upon the questions involved, of eminent authority upon Mexican law, and we herewith present the essential part of the joint opinion of Hon. Y. Sepulveda, Secretary of Legation at Mexico, and of Hon. Luis Mendez, President of the Mexican Academy of Legislation and Jurisprudence, upon this particular question.

To them belongs the credit of calling attention first to a patent and most important contradiction which exists between English and Spanish copies of the treaty mentioned, in a particular which, under rules of construc tion of similar treaties, will do away with the element of "location", so held in the Ainsa case as a necessary requisite to confirmation of these grants.

Both the English and Spanish copies of this treaty are originals. Messrs. Sepulveda and Mendez, among other things, say:

" U. S. Statutes at Large, Vol. 10, p. 1031. The con-
" tradiction or mistranslation occurs in article VI,
" of the treaty: *Id.*, p. 1035, as follows:

FROM THE ENGLISH:

Or will any grants made previously be respected or be considered as obligatory which have not been *located* and duly recorded in the archives of Mexico.

FROM THE SPANISH:

Ni tampoco se respectáran, ni considerarán como obligatorias ningunas concesiones hechas con anterioridad que no hayan sido *inscritas* y debidamente registradas en los archivos de Mexico.

" It is apparent that the word 'located' should have " been omitted from the English copy, and the word " 'inscribed' used instead.

" *Dominguez Diccionario Nacional*, inscrito, ta. " part. pas. irr. de Inscribir.

" On the other hand, if the English word 'located' " expressed the intention of the contracting parties, the " corresponding word in the Spanish version would " have been 'colocado'.

" *Dominguez Diccionario Nacional*, 'colocado', da. " part. pas. de colocar o colocarse.

" *Spanish and English Dictionry*, Velazquez, 'to lo- " cate', p. 314; 'colocar', p. 162.

" The word INSCRITAS, in the Spanish text of the treaty, from INSCRIBIR, signifies, speaking of titles by grant, to enter them in writing in some register or book of registers, and, in the legal Mexican expression, the words, REGISTRO E INSCRIPCION, REGISTRADO, é INSCRITO, are used indifferently one for the other, to signify the same idea, that is TO MAKE a note or make a compendium in a book called 'Register Book, Record Book' (Libro de Registro ó de Inscripciones) of the contents of a document. Hence these expressions we find used indistinctly in the Mexican Civil Code; for instance, in Title XXIII. of the Book III. of the Civil Code, which treats of the Public Register, or Books of Record, where note is to be taken of certain titles or documents mainly relating to real estate, we read: Art. 3188. 'The ' REGISTRY (record) shall be made in the office ' where the property mentioned is, according to its ' situation.' Art. 3189. 'If the property should ' be situated in different districts, the registry shall

'be made in all of them.' Art. 3190. 'Ninguna 'inscripcion puede hacerse si no consta que el que 'la pretende es actualmente dueño de los bienes, 'tiene derecho para exigir el REGISTRO ó pro- 'ceda con podor legal del propietario (No INS- 'CRIPTION shall be made if it does not 'appear that the one desiring it to be 'made is the present owner of the property, having 'a right to demand its REGISTRY, or acts with a 'legal power of the owner). Art. 3191. 'Solo 'pueden INSCRIBIRSE los títulos que constan de 'escrituras públicas, y las sentencias y providencias 'judiciales certificadas legalmente.' (There can only be INSCRIBED the titles that appear in public writings and the judicial sentences and orders legally certified.) Art. 3219. 'LAS INSCRIPCIONES 'no se extinguen en cuanto á tercero sino por su 'cancelacion, ó por el REGISTRO de la transmisión 'del domino ó derecho real INSCRITO á otra per- 'sona' (The inscriptions are not extinguished with regard to third persons, unless they be canceled, or by the registry of the transfer of ownership or right of realty INSCRIBED to another person). Examples might be multiplied to show that in the language of the Mexican laws now as before, and at all times, the INSCRIPTION of a grant or title to land, as well as that of any other instruments or documents, is nothing more than taking note of it or having it entered in a public REGISTER or Record."

Second.

THE SPANISH VERSION OF THE GADSDEN TREATY MUST CONTROL IN CONSTRUING THIS GRANT, BECAUSE

(*a.*) *This identical point was decided in the case of*

U. S. versus Arredondo, 6 Peters 740, where this Court said:

> "The King of Spain was the grantor, the treaty was his deed, the exception was made by him, and its nature and effect depended on his intention, expressed by his words, in reference to the thing granted, and the thing reserved and excepted in and by the grant. The Spanish version was in his words, and expressed his intention, and, though the American version showed the intention of this Government to be different, we cannot adopt it as the rule by which to decide what was granted, what excepted and what reserved; the rules of law are too clear to be mistaken and too imperative to be disregarded by this Court. We must be governed by the clearly expressed and manifest *intention of the grantor, and not the grantee*, in private a fortiori, in public grants."

This has become a rule of property which ought not to be disturbed or changed except for very momentous reasons.

(b) *The best writers on International Law declare that when a treaty is made in two languages, and one expresses a different idea from the other, that text ought to be taken as the original in which the treaty was negotiated, and the other as an authentic translation; and the original text should prevail and the translation ought to be corrected.*

See *Annotations on Marten's Compendium of Derecho de Gentes*, Book VI, p. 179, by Penheyro–Ferreira.

This view of the question is in conformity with the principles governing contracts between individuals.

The presumption is that a contract was entered into in the language of the country where it was made, and especially is this so when the subject matter is an instrument which in most countries, Mexico among them, can only be executed in the official language which is the national language. The treaty of 1853 was negotiated in Mexico and presumably it was negotiated in Spanish, and presumably the text in that language served for its discussion.

(c.) *So far as the rights of individuals are concerned, in construing statutes, treaties, contracts, and written instruments generally, the courts adopt a liberal construction, and if the statute or treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal as respects such rights, the latter is to be preferred.*

1 Kent Com., 174;
Sharkes vs. *Dupont*, 3 Pet. 242;
Hauenstein vs. *Lynham*, 100 U. S. 483;
The Amiable Isabella, 6 Wheat. 1;
U. S. vs. *Perchman*, 7 Pet. 832;
North German Lloyd S. S. Co. vs. *Hadden*, 43 Fed. 20;
U. S. vs. *Payne*, 8 Fed. 892.

(d). *The construction adopted by this Court, in its opinion, results in the confiscation of this grant and operates as à forfeiture of a vested property right, for which a valuable and money consideration was paid.*

" No construction of a treaty which would impair that security to private property which the laws

and usages of nations would, without express stipulations, have confirmed would seem to be admissible further than its positive words require."

Strother vs. *Lucas*, 12 Pet. 438.

In the case of *Chew Heong* vs. *U. S.*, 112 U. S. 536, Mr. Justice Harlan, speaking for this Court, said:

"Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, *the Court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected;* and it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the Government were it to doubt for a moment that these considerations were present in the minds of its members when the legislation in question was enacted."

When the Treaty of Guadalupe Hidalgo was being negotiated our Secretary of State wrote to the Mexican Minister of Foreign Relations and said, in relation thereto and for the purpose of inducing Mexico to accept the treaty without the insertion of certain additional conditions and stipulations for the protection of its citizens, that:

"It is our glory that no power exists in this country which can deprive one individual of his property without his consent and transfer it to another. If grantees of land in Texas under the Mexican Government possess valid titles they can maintain their claims before our courts of justice."

And, said our Secretary of State:

"The property of foreigners, under our Consti-

tution and laws, will be equally secure without any treaty stipulations."

Again, he says:

> "And here it may be worthy of observation, that if no stipulations whatever were contained in the treaty to guarantee to the Mexican inhabitants and all others protection in the free enjoyment of their liberty, property, and the religion which they profess, these would be amply guaranteed by the Constitution and laws of the United States. These invaluable blessings under our form of government do not result from treaty stipulations, but from the very nature and character of our institutions."

As was said by this Court in *De Lassus* vs. *U. S.*, 9 Peters 133:

> "Independent of treaty stipulations, this right (the perfect inviolability and security of property) would be held sacred. The sovereign who acquires an inhabited territory acquires full dominion over it, but this dominion is never supposed to divest the vested rights of individuals to property. The language of the treaty ceding Louisiana excludes every idea of interfering with private property; to transfer lands which had been severed from the royal domain. The people change their sovereign. Their right to property remains unaffected by this change."

And yet under the construction given to the treaty by this Court, the title to the Arivaca Grant which has been vested in the claimant and his predecessors in interest since 1812 (a period of ninety years), and of which grant he has held undisputed possession during that time, is wrested from him upon the theory that this government *intended* by its solemn contract with

Mexico to accomplish this great wrong and that Mexico was so reckless of its obligations and duties to its own citizens that it consented thereto.

The Mexican Minister at Washington, in a note addressed to the Secretary of the Interior of the United States on July 3, 1888, pursuant to instructions from the Secretary of State of Mexico, explained the understanding of the Mexican Government of that clause of the Gadsden Treaty requiring record evidence in the following language:

> "When the United States acquired a considerable part of Mexican territory, first by the treaty of February 2, 1848, and afterwards by the treaty of December 30, 1853, both governments agreed in their desire to protect the inhabitants in their rights acquired to the lands which changed national ownership and agreed to respect inviolably the concessions (grants) of lands made by Spanish and Mexican governments previous to the dates of both treaties, and in Article 8 of the first treaty and in Article 6 of the second treaty their right of ownership to all their possessions was acknowledged (recognized, sustained) and also their right to dispose thereof as they should see fit.
>
> "But the object of this stipulation was merely to put an end to the abuses that had been committed by virtue of the first treaty in the presentation of fraudulent grants, and it was never the intention to deprive the legitimate owner of a piece of land of his rights thereto merely because he was unable to furnish legal proof of the grant or its record by exhibiting his title in any case, where the archives had been destroyed by the invading United States Army."

Nor ought it to be lightly presumed, we may add,

that it was the *intention* of the high contracting parties to deprive a *bona fide* owner of his land, simply because the government of Mexico had made a mistake in the survey, which had never been discovered by either party, and hence had never been rectified, prior to the treaty. To so hold is to declare that it was the *intention* of these two great nations to make an innocent and humble individual suffer for the *mistakes* of a powerful nation.

Blackstone tells us that in construing a law we should first examine the old law, then the mischief, and next the remedy. We know that article six of the Gadsden Treaty was intended as a *remedy*. We also know that the *mischief* which it was intended to remedy is fairly and correctly stated in the letter of the Mexican Minister at Washington which has just been quoted.

The discovery of gold in California followed close upon the heels of this Government's acquisition of that immensely rich territory, and the phenomenally rapid increase in the value of property, which but a few years before had been liberally granted by the Mexican Government in square leagues and not acres, aroused the cupidity of unscrupulous land-grabbers, and in Pio Pico, who was Governor of California at the time the war broke out, these designing rascals found a willing tool to aid them in their efforts to steal property which had so suddenly become of immense value. It was proven to this Court by unimpeachable evidence in numerous instances, that said Pico had fraudulently

issued grants to different individuals after the war with Mexico had commenced and after the United States had secured possession of a large part of that territory, and that Pio Pico had antedated those grants to the end that they might be held valid under the treaty that terminated said war.

Antedated title papers were issued by Pio Pico in due form of law, and if they were to be adopted as *prima facie* evidence of title by this Government when produced from the pocket of the grantee or by his assignee, who in many cases was a *bona fide* purchaser for value, it would have been practically impossible for this Government to protect its property from gross fraud, because it was an easy matter to establish the fact that many of the records of the Mexican Government relating to land titles had been lost or destroyed, and it thus became almost an impossibility for this Government to furnish conclusive evidence that the title papers in question had been antedated.

Necessity, therefore, compelled this Court to depart from the well-recognized principles of law which it has uniformly applied in passing upon the question of the validity of a title to land in the United States when the grantee holds a patent from this Government to his lands.

The laws of the United States require that a patent to land be recorded at length in certain books which are kept in the archives of this Government at Washington, and in that manner our Government preserves

a record which gives the complete description of the land granted, and yet this Court held in the case of *U. S.* vs. *Marshall Mining Company*, 127 U. S. 569, that the recording of the patent is not essential to the validity of the title of the grantee.

In the case of *U. S.* vs. *Stone*, 2 Wall. 525, this Court said:

> "The patent is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patent or title until it is set aside by some judicial tribunal."

It cannot be doubted that, had this grant remained within the jurisdiction of Mexico, this claimant could have made out a *prima facie* case by simply producing his titulo and proving the authenticity of the signature of the granting officer. The absence of any trace of record evidence in the archives of Mexico would have in no way affected his title, and the burden would rest upon the Mexican Government to establish fraud by clear, convincing and unequivocal proof in order to avoid the grant.

Under the treaty of Guadalupe Hidalgo, it seems to the writer, this Court would have adopted that principle in passing upon the validity of titles to grants in California, just as it did in the early cases under the Louisiana and Florida treaties. But in order to counteract the gross frauds which had been attempted in California, the direct proof of which had been brought to the attention of this Court, it was necessarily compelled to refuse to indulge this presumption, and to

require some evidence that at least a portion of the record of a grant which was required to be made by the Mexican officials existed, or had existed in the archives, or, in the absence of any trace of such record evidence, that the grantee had been in possession of the land for a sufficient length of time prior to the treaty to avoid any suspicion of the *bona fides* of his claim.

As was said by this Court in the case of *U. S.* vs. *Neleigh*, 1 Black 306:

> "The propositions laid down in the *Castro case* and others preceding it were an absolute necessity to save the Government from utter spoliation of its territory * *. * The numerous frauds which had been attempted to be perpetrated, depending upon this theory of the destruction of the records, have compelled us to reject it altogether as fabulous."

Yet in the case of *De Aro's Heirs*, 22 How. 293, a grant was confirmed without any record evidence and upon the titulo alone and proof of its genuineness, accompanied with 16 years' possession of the land.

And a careful examination of all the land-grant cases from California will disclose the fact that when the authenticity and genuineness of the title papers were not disputed by this Government, and when the grantee was in possession of the land prior to the acquisition of the territory by this Government for a sufficient length of time to repel the suspicion of fraud, that rule of necessity in regard to record evidence was never enforced.

The writer has not been able to find a single case in which that rule of record evidence was enforced by this Court when the facts of the case did not justify a strong suspicion that the title was conceived and executed in fraud; and the Court uniformly called attention to the facts creating this suspicion and to its existence, in apparent justification of the Court's action in refusing to accord to the title, standing alone, all those presumptions which it would give to a patent from the United States.

In the case of *Gonzales* vs. *Ross*, 120 U. S. 629, this Court quotes with approval from the case of *Byrne* vs. *Fagin*, 16 Tex. 391 that—

> "Where there is a testimonio there is a presumption that the original is among the archives of the land office in its proper place of deposit. At all events, it is for the defendants to show by proper proof that it is not there."

In following Blackstone's suggestion that we examine the old law, then the mischief and then the remedy, we have already seen that under "the old law" the production of the titulo itself and the proof of its authenticity would immediately raise the presumption that the grant had been "duly recorded" in the archives.

We have further seen that the "*mischief*" rested in the fact that it was comparatively easy after the acquisition of California, for Pio Pico, who had been Governor of that territory, to manufacture and antedate grants which it would be difficult to defeat under the well settled *presumptions* of the "*old law*"; and that, there-

fore, the "*remedy*", which the necessities of the times had forced upon this Court, was adopted by our Minister when entering upon the treaty with Mexico for the acquisition of the lands comprised within the Gadsden purchase. It is fair to presume, therefore, that it was the intention of both the parties to that contract or treaty that only such evidence that the grant had been duly recorded should be required, as the investigations of this Court had already demonstrated to be absolutely necessary in order to protect this Government from being despoiled of its property by fraud.

Whatever may have been the mischief against which the United States desired to protect itself by the requirement that the grant need not be respected or be considered as obligatory, unless it had been "located" prior to the treaty, it must be apparent that the minds of the two contracting parties did not meet upon the proposition that the grantee should be deprived of his property in land which had originally been solemnly located by the Mexican Government by a survey made prior to the execution of the grant and made for the very purpose of describing the particular piece of land which the Government intended to convey. To so hold is to inject the words "accurately and correctly" into the treaty, so that it will read, that no grant need be respected or be considered as obligatory which had not been "accurately and correctly" located prior to the treaty. It would seem to be more in accordance with the principles of equity and of natural justice, as well

as morality, to hold that *a grant was "located" within the meaning of the treaty; provided a survey of the grant was made by the Mexican Government prior to the treaty in good faith for the purpose of locating upon the ground the particular land which it intended to convey.*

Any bona fide attempt by the Mexican Government to locate the grant prior to the treaty ought to be considered in equity as an actual location within the meaning of the treaty. In no other way can full justice be done to individuals.

> "All courts ought to feel a disposition to support a grant fairly made for a valuable consideration", says Chief Justice Marshall in *Blake* vs. *Doherty*, 5 Wheat. 362, and it is a cardinal rule that "equity abhors a forfeiture."

Third.

THE MOST LIBERAL VIEW WHICH CAN BE TAKEN OF THIS GRANT IS THAT THE GRANT IS A MERE "FLOAT". IF THE LAW OF SONORA OF MAY 14th, 1852, IS READ INTO THE TITLE PAPERS OF THIS GRANT, THE RIGHTS OF THE GRANTEE BECOME AT LEAST AS STRONG AS AND ALMOST SYNONYMOUS WITH THOSE OF THE OWNER OF A "FLOATING" GRANT SUCH AS THIS COURT BECAME FAMILIAR WITH IN THE CASES INVOLVING TITLES TO MEXICAN GRANTS IN CALIFORNIA.

A "floating" grant vested a right of property in the grantee which is protected by the Constitution of the

United States and of which he cannot be divested without adequate compensation.

Fremont vs. *The United States*, 58 U. S. 542:

"The words of the grant are positive and plain *They purport to convey to him a present and immediate interest.*" *id.*

"But although this cannot be regarded as a money consideration, making the transaction a *purchase* from the Government, yet it is the acknowledgment of a just and equitable claim; and when the grant was made on that consideration the title in a court of justice ought to be as firm and valid *as if it had been purchased with money on the same conditions.*" *id.*

"But, as between him and the Government, he had a *vested* interest in the quantity of land mentioned in the grant. *The right to so much land to be afterwards laid off by official authority in the territory described passed from the Government to him by the execution of the instrument granting it.*" *id.*

"The principles decided in this case appear to the Court to be conclusive as to the legal effect of the grant to Alvarado. *It recognizes as a general principle of justice and municipal law that such a grant* for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain territory, *vests in the grantee a present and immediate interest.* In the language of the Court, the general gift becomes a particular gift when the survey is made; *and when this doctrine has been asserted in this court upon the general principles which courts of justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican Government where a controversy arises between the United States and*

the Mexican grantee." *id.*

See also *Hornsby* vs. *United States*, 77 U. S. 232, Opinion by Justice Field.

In the case at bar, *the grantee paid a money consideration to the Mexican Government for his grant*, and it would seem that *in such a case there can be no possible doubt, but that a court of equity will treat the grant as firm and valid.*

The honor of the United States Government is at stake, and this Court has frequently declared that it was not the intention of Congress to forfeit grants, or to confiscate private property or to determine the rights of private parties under the treaty in a narrow and illiberal manner, but that it is the intention of this Government and of Congress to afford protection and security to all just rights which the petitioner could have claimed at the date of the treaty from the Mexican Government.

U. S. vs. *Agricola*, 1 Wall. 358.

Under the law of Sonora of May 14th, 1852, the claimant had a clear and undisputed legal right to select his "cabida legal" at any place he chose within the boundaries described in his title papers. *This, then, was a vested right of property in the grantee at the date of the Gadsen Treaty. To deprive him of this property right is to confiscate his property without due process of law. It is to declare a forfeiture by a narrow and illiberal construction of the treaty, which was executed in duplicate, and under the Spanish version of which this govern-*

ment is in honor bound to respect and recognize this grant.

Under Mexican laws the right of the grantee was not vested in any particular two (or four) sitios of land within the boundaries described in his title papers. Demasias are defined by Art. III, Chapter I of the Mexican law of 1894:

> "To be thus held by private persons on *primordial* title and to a greater extent than specified, such surplus however being within the boundaries mentioned in the title, and, consequently, mixed up in its entirety with the area for which a title is held."

In this character of grant the Demasias were always treated as being "mixed up in its entirety with the area "for which a title was held". Of course that is only another way of stating that *the "cabida legal" is mixed up in its entirety with the surplus lands* embraced within the boundaries described in the title papers. Hence the grantee never had an indefeasible title to any particular two (or four) sitios of land within the boundaries described in his title papers, *but he had a vested right to select that quantity where he chose within those limits.*

This Court necessarily erred therefore in holding that the grant is void unless the "cabida legal" was originally nailed to the ground at some particular point within the boundaries described in the title papers.

Art. IV of law No. 197 of the State of Sonora, enacted May 14th, 1852, is as follows:

> "The holders shall have the power to select, within the boundaries stated in the grant, the principal, or main, area, which may be more suitable to them, provided that the demasias are arranged in such a way as to make them adjoin each other and form a body, thus allowing them to be sold to advantage." See translation by Dr. J. I. Rodrigues, chief translator for the Bureau of American Republics, as same appears in "ADDITIONAL BRIEF FOR CLAIMANTS" in cases Nos. 109 and 129 (consolidated), October term, 1901.

Until judicial action was taken in Mexico to compel the grantee to select his "cabida legal", or principal area, under said law of Sonora, it must be apparent that "to every and to each part of the land surveyed its "owner had an equal right", as was said by Chief Justice Marshall in the case of *Taylor* vs. *Brown*, 5 Cranch. 234, in construing a grant in Virginia, under its ancient laws which likewise provided that the grantee or patentee could "allot the surplus" in any part of the grant which he chose. The right to "allot the surplus" is the exact equivalent of the right to select the "cabida legal" or principal area. And this right was fully recognized by the law of the State of Sonora, No. 51 of May 12th, 1835, which reads in part as follows:

> "ARTICLE 2. Those are likewise *bona fide* owners who, under the description given in their records of survey, occupy some excess of land; and they are entitled to such excess, even after such excess is shown, without any other requirement

than that of paying for the excess in accordance with the quality of the land at the price which prevailed when the land was measured and appraised, and only in case the owner does not want the excess, or when such excess is very great in the opinion of the government, upon the report of the treasurer, shall such excess be awarded to any one denouncing or soliciting it; and such person shall bear the expense of the resurvey if excess has not been ascertained. In lands measured by calculation none shall be regarded as excess that does not exceed half a sitio."

NOTE.—The foregoing is the official translation, made expressly for this Court and adopted by it in the case of *Ainsa* vs. *U. S.*, 161 U. S. 225.

And this law was not repealed by said law No. 197 of May 14th, 1852, as in Mexico laws are not repealed by implication except in so far as they are repugnant to the later laws.

Compiled laws of Mexico Vol. 3, Page 557.

In the case of *United States* vs. *Moreno*, 1 Wall. 400, this Court said:

"A right of any validity before the treaty was equally valid afterwards. The act recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit."

And in the case of *Hornsby* vs. *United States*, 10 Wall. 224, this Court said:

"The word property includes every species of title inchoate or complete. It is supposed to embrace those rights which are executory as well as those which are exceuted. In this respect the relation of the inhabitants to their government was not changed. The government takes the place of that which has passed away."

Surely it has never been contended, and it cannot be successfully contended, that this grantee did not have a vested right of property at the date of the Gadsden Treaty.

It can make no difference that the out-boundaries of the grant are not fixed with absolute nicety and certainty. Nearly all of the floating grants in California had very loosely defined out-boundaries. The grantee who has paid a money consideration ought not to suffer by reason of the fact that the officers of the Government failed to describe the out-boundaries so that they can be identified with absolute certainty after this great lapse of time. If two sides of the grant can still be located with reasonable certainty, and those two sides meet at an angle the grantee ought to be permitted to select his "cabida legal" at any place within the angle so made by those two sides, and if three sides of the grant can still be located with reasonable certainty there would seem to be no difficulty whatever about giving to the grantee his "cabida legal" in such a way as to assure its being located within the original boundaries described in the title papers.

> "It is not necessary that the grant itself should contain such a description, as without the aid of extrinsic testimony, to ascertain precisely what is conveyed."
>
> *Blake* vs. *Doherty*, 5 Wheat. 359.

It may be suggested, however, that it has not been shown that we complied with Art. II of said law of 1852, and that therefore we have lost our right to *select*

our principal or main area under Section IV of said law. It will be noticed that the "original records of the survey" are to be forwarded to the Treasury. In this grant those "original records" were never in the possession of the grantees or their successors in interest, but were deposited in the Treasury in the first instance, and have remained there ever since. A *copy* thereof *only* was delivered to the grantees (Record, pp. 531 and 234).

This law was not intended to apply to those cases where the *original expediente* remained in the archives, but to those in which said "original records" were lost from the archives, or by some means got into the hands of the owner of the land, as was not infrequently the case.

Fourth.

THE FACT THAT MEXICO LONG SUBSEQUENT TO THE DATE OF THE TREATY WITHDREW FROM THE GRANTEE THE RIGHT TO SELECT HIS "CABIDA LEGAL" IN ANY PART OF THE GRANT HE CHOSE, AND THAT IT ASSUMED THE RIGHT TO SELECT SUCH "CABIDA LEGAL" FOR HIM, CAN IN NO WAY AFFECT THE RIGHTS OF THIS GRANTEE. THE ACTION OF MEXICO IN THIS RESPECT OUGHT NOT TO BE EVEN OF ANY PERSUASIVE EFFECT UPON THIS COURT IN DETERMINING THE RIGHTS OF THIS GRANTEE.

Mexico has not always acted according to the most enlightened views of morality or equity in its dealings with its citizens with respect to their property rights. The congress of Mexico can overturn vested rights of property and can impair the obligation of contracts with impunity. That body is the judge of the constitutionality of its own laws. But because Mexico has so done, it does not follow that it would be in accordance with equity or good morals for this Government to follow suit.

The moment this land became a part of the United States the rights of the grantee, as they existed at the date of the treaty, passed under the protection of the Constitution of the United States.

As was said by this Court in the case of *Pollard's Lessee* vs. *Hogan*, 3 How. 219:

> "*Every nation acquiring property by treaty, or otherwise, must hold it subject to the Constitution and laws of its own government, and not according to those of the government ceding it.*"

The right of the grantee to select his "cabida legal" in any part of the grant he chose, is a vested right of property which under the sturdy principles of Magna Charter and under the Constitution of the United States, and under the principles of natural justice, cannot be taken away from him without adequate compensation. This Court has held that in the absence of any constitutional provision against the impairment of contractual obligations a law which

vests a property right cannot be repealed so as to affect vested rights, and these decisions are based expressly upon principles of natural justice.

Terrett et al. vs. *Taylor*, 9 Cranch. 44;
Fletcher vs. *Peck*, 6 Cranch. 177.

For the foregoing reasons we urge this Honorable Court to recall the remittitur which it has caused to be issued in this case, and to review its decision in the foregoing matter.

Respectfully submitted,

JOHN W. GRIGGS,
FRANCIS J. HENEY,
ROCHESTER FORD.
Attorneys for Appellant.

We hereby certify that in our opinion the foregoing petition for a re-hearing is well founded in law.

JOHN W. GRIGGS,
FRANCIS J. HENEY,
ROCHESTER FORD,